ARGUMENT

Rule 1.420(e) of the Florida Rules of Civil Procedure (which results in the dismissal of lawsuits without a trial), and the status of the law in regard to the Rule, has been, and is, so unclear that the Second District Court of Appeals of Florida asked the Florida Supreme Court on two recent occasions to clarify the Rule and the status of the law. Because the Florida Supreme Court has not yet clarified the Rule, the Rule, and the status of the law regarding the Rule, remains so unclear that it violates the Due Process Clause of the Fourteenth Amendment.

History of Rule 1.420(e)

Prior to the adoption of Rule 1.420(e), the Florida Supreme Court, in interpreting a Florida statute that required 'action' to keep a case pending and prevent dismissal of the case, differentiated between 'passive' and 'active' activities. *See* Wilson v. Salamon, 864 So.2d 1122 (Fla.App. 2nd DCA 2003). After many decisions and years of differentiating between 'passive' and 'active' activities, the Florida Supreme Court adopted Rule 1.420(e). In the Rule the Florida Supreme Court did not set forth any exception for 'passive' activities and did not differentiate between 'passive' and 'active' activities. *See* Wilson, *supra*. The Rule states that '[a]ll actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 1 year shall be dismissed by the court on its own motion or on the

motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending' (emphasis added).

After the adoption of Rule 1.420(e), Florida courts, at times, continued to differentiate between 'passive' and 'active' activities (even though the Rule made no such differentiation), and because there has never been any uniformity and agreement in the Florida courts as to the definition of 'passive' and/or of 'active' activities, there has never been any uniformity and agreement in the Florida courts as to 'when' an action should be dismissed under Rule 1.420(e).

In Metropolitan Dade County v. Hall,784 So.2d 1087 (Fla. 2001), the Florida Supreme Court appeared to have resolved this problem and to have made it clear that all activities of record are 'record' activities. The Florida Supreme Court in Metropolitan stated that lawsuits are to be dismissed only if there is 'no activity within the past year', that '[t]his requires only a review of the record', and that '[t]here is either activity on the face of the record or there is not'.

Because the Florida Supreme Court in Metropolitan (with full knowledge that Florida trial and appellate courts had been differentiating between 'passive' and 'active' activities.) did not differentiate between 'passive' and 'active' activities, it appeared to the Second District Court of Appeals (and to possibly more of Florida's five appellate courts) that any and all record activities

were sufficient to keep a lawsuit pending and prevent its dismissal. *See* Wilson .

Because the Second District wanted, as a matter of great public importance, to be 100% certain as to the status of the law surrounding Rule 1.420(e), it certified to the Florida Supreme Court 'the following question as a matter of great public importance:

AFTER THE DECISION IN METROPOLITAN DADE COUNTY V. HALL, 784 SO.2D 1087 (FLA. 2001), ARE TRIAL COURT ORDERS THAT ARE ENTERED AND FILED TO RESOLVE MOTIONS THAT HAVE BEEN PROPERLY FILED IN GOOD FAITH UNDER THE RULES OF PROCEDURE AUTOMATICALLY TREATED AS ACTIVITY, OR MUST THE TRIAL COURT CONTINUE TO ASSESS ITS OWN ORDERS TO DETERMINE WHETHER THEY ARE PASSIVE ENTRIES IN THE COURT RECORD?' *See* Wilson, *supra*.

This question was not answered by the Florida Supreme Court in Wilson. The Florida Supreme Court refused to answer this question again in the action at bar. As a result, the law in Florida continues to be very unclear, uncertain, nonuniform, and arbitrary with respect to the dismissal of lawsuits, and because the Florida Supreme Court has refused to modify the language of Rule 1.420(e) and has not answered, on two separate occasions, the above question, the Petitioner is requesting for this Court to grant this Petition and find that clarification of Rule 1.420(e), and the law surrounding it, is of great importance to the Due Process Clause of the Fourteenth Amendment.

The most accurate and direct question that Petitioner would like to have answered by this Court is 'how in the world

can my lawsuit be dismissed for failure to prosecute when I (through my attorney) was the only party making any attempt whatsoever to move the case forward, considering that my attorney was doing what was reasonably necessary to move the case forward, and considering that the Respondents and the trial court were either making no attempt to move the case forward, or were intentionally preventing the case from moving forward?' (*See* the Affidavit of my trial attorney attached as Appendix Document # 6). But because Petitioner understands that this question is not one that this Court is probably willing to answer, he will not mention again all of the efforts of his attorney to move the case forward nor the obstructions, or lack of effort or cooperation, by the Respondents.

Instead, the Petitioner will focus on Rule 1.420(e), and the status of the law regarding the Rule, and 'why' the Rule, and the status of the law regarding the Rule, runs afoul of the Due Process Clause of the Fourteenth Amendment.

The resolution of this Petition involves a two part inquiry: whether Petitioner was deprived of a protected property interest; and if so, what process was due. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

With respect to the first part of the inquiry, because this Court has held on numerous occasions that a cause of action is a property interest protected by the Due Process Clause of the Fourteenth Amendment and because the Petitioner's cause of action was dismissed (forever and 'with prejudice' as a result of the applicable statute of limitations and his inability to refile the lawsuit), the Petitioner contends that the answer to the first part

of the inquiry is 'yes'. (*See* Logan, *supra*; Societe Internationale v. Rogers, 357 U.S. 197 (1958); and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)). (See also Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Hansberry v. Lee, 311 U.S. 32 (1940); Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909); and Hovey v. Elliott, 167 U.S. 409 (1897).

With respect to the second, and more difficult, part of the inquiry, the Petitioner contends that the process that was afforded to him by Rule 1.420(e) did not satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.

In Logan, this Court, in addressing the Due Process Clause of the Fourteenth Amendment in relation to state procedures and rules that result in the dismissal of claims, referred to the longstanding principal that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action' (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980)). The Logan Court stated that any other conclusion would allow the State to arbitrarily destroy state-created property rights. 'While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.' *See* Logan, *supra* and Vitek, *supra* (*quoting* Arnett v. Kennedy, 416 U.S. 134, 167 (1974). While it 'remain[s] true that the State's

interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." Logan, *supra* (*quoting* Martinez v. California, 444 U.S. 277, 282 (1980).

The Logan Court addressed the Constitutionality of a provision of the Illinois Fair Practices Act (hereinafter 'FEPA') that required the Illinois Fair Employment Practices Commission (hereinafter 'the Commission') to convene a fact finding conference within 120 days of the bringing of a claim, or else the claim would be barred. The Logan Court, after finding that the 120 day limitation is a procedural limitation rather than a substantive element of the FEPA claim, determined what process was due to Logan.

In determining what process was due, the Logan Court considered the importance of the private interest and the length or finality of the deprivation (*citing* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978); and Mathews v. Eldridge, 424 U.S. 319, 334 -335 (1976)), the likelihood of governmental error (*citing* Mathews at 335), and the magnitude of the governmental interests involved (*citing* ibid.; and Wolff v. McDonnell, 418 U.S. 539, 561 -563 (1974). *See also* Gilbert, President, East Stroudsburg University v. Homar, 000 U.S. 96-651 (1997).

With respect to the first of the three factors set forth above in Logan, the Logan Court found that the deprivation was final.

With respect to the second of the three factors, the Logan Court stated that a 'system or procedure that deprives

persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated' and found the subject 120 day provision to be such a system and/or procedure.

With respect to the third factor, the Logan Court found that any Illinois interest in refusing Logan's procedural request was insubstantial.

Based on the Logan Court's findings with respect to the three factors and because Logan was not challenging any specific error by the Commission but instead the "established state procedure" that destroyed his entitlement without according him proper procedural safeguards, the Logan Court held that the 120 day provision of the FEPA violated the Due Process Clause of the Fourteenth Amendment.

Because the pertinent facts in this action are substantially similar to those in Logan, this Court should follow the Logan decision and hold that Rule 1.420(e), and the status of the law regarding the Rule, runs afoul of the Due Process Clause of the Fourteenth Amendment.

With respect to the first of the three factors set forth in Logan, because the dismissal of Petitioner's lawsuit resulted in a dismissal 'with prejudice' as a result of the applicable statute of limitations and his inability to refile the lawsuit, the first factor weighs heavily in favor of a finding that the Rule, and law regarding the Rule, runs afoul of the Fourteenth Amendment Due Process Clause. While this first prong of the three prong test might not result in a finding of a Fourteenth Amendment Due Process violation in those instances where a Rule 1.420(e)

dismissal occurs within the applicable statute of limitations, this first prong certainly weighs in favor of such a finding in instances, such as the action at bar, where the dismissal results in a dismissal 'with prejudice' as a result of the applicable statute of limitations."

The Petitioner concedes that the interpretation and application by a court of a rule in a manner that is 100% inconsistent with the rule's plain and unambiguous language does not necessarily equate to a Fourteenth Amendment Due Process Clause violation and that it depends on the particular rule at issue. In this regard, the Petitioner contends that, because Rule 1.420(e) results in the dismissal of lawsuits, it is such a Rule, particularly when it results in a dismissal with prejudice.

With respect to the second of the three factors set forth in Logan, because there is no uniformity in the Florida courts as to whether 'passive' record activities are to be considered 'record' activities, Florida claimants are being deprived of their claims in a random manner, and as the Logan Court stated this 'necessarily presents an unjustifiably high risk that meritorious claims will be terminated'. As a result, the second factor also weighs in favor of a finding that the Rule, and the status of the law regarding the Rule, runs afoul of the Fourteenth Amendment Due Process Clause.

With respect to the third factor, while an interest is certainly served Florida by a Rule that provides for the dismissal of lawsuits in case in which there has been no record activity for a period of one year, no interest is served by a dismissal Rule that can only be applied in an arbitrary and random fashion and

that, as a result, really isn't a rule at all. Florida has an interest in having a dismissal rule that is neither arbitrary nor random and that is applied uniformly throughout the State. It is in the best interests of all, including judges, attorneys, and parties, for there to be no arbitrariness and no randomness in the interpretation and application of Rule 1.420(e). As a result, the third factor also weighs in favor of a finding that Rule 1.420(e), and the status of the law regarding the Rule, runs afoul of the Fourteenth Amendment Due Process Clause.

Based on the Logan decision and the three factors set forth above, and because the Petitioner, similar to Logan, is not challenging any specific error by the Florida courts but instead the vagueness, arbitrariness, and randomness of the "established state procedure" that resulted in the dismissal of his lawsuit without according him proper procedural safeguards, the Petitioner contends that his rights under the Due Process Clause of the Fourteenth Amendment have been violated.

Additionally, there is no doubt that Rule 1.420(e) is being interpreted and applied in a manner that is 100% inconsistent with the plain and unambiguous language set forth therein, as Rule 1.420(e) does not require specific types of activities to occur within the subject year and as it does not exclude so-called 'passive' activities. Rule 1.420(e) provides for a dismissal only if 'it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 1 year' (emphasis added).

Because there were no less than six (6) 'record' activities within the subject year (the filing of a Joint Stipulation; an Order; the attendance of counsel at a hearing and the signing of a Joint Stipulation at the courthouse; the filing of a Notice of Unavailability; the entering of an Order Scheduling Case Management/Dismissal Docket; and the filing of the Rule 1.420(e) motion, which was filed on the 365th day of the subject year), the lawsuit and action should not have been dismissed.

CONCLUSION

For all of the reasons set forth above, the Petitioner requests for this Honorable Court to grant this Petition and reverse the trial court's Order entered on October 16, 2003 and the corresponding dismissal of the lawsuit and action.

Carl W Cosio

Carl W. Cosio, *pro se*
3910 North Dartmouth Avenue
Tampa, FL 33603
(813) 223-1297

NOTARIZED AFFIDAVIT/DECLARATION
OF SERVICE IN COMPLIANCE WITH 28 U.S.C. § 1746

I, CARL W. COSIO, HEREBY DECLARE AND CERTIFY under penalty of perjury that three (3) true and correct copies of this Petition for a Writ of Certiorari have been sent by U.S. mail on December 10, 2005 to the following, who represent all of the parties that are required to be served:

Leroy H. Merkle, Jr., *pro se*
P.O. Box 1774
Tampa, FL 33601-1774
Phone: (813) 314-0555

Timothy P. Moran, *pro se*
P.O. Box 3306
Tampa, FL 33601-3306
Phone: (813) 253-3277

Bradley M. Bole
The Alexander Building
535 Central Avenue
St. Petersburg, Florida 33701-3703
Phone: (727) 823-4191
Attorney for Barbara Boyd Keithly

Ullman & Kurpiers, LLC.
Attn: Melody M. Dietsch
410 South Ware Blvd., Suite 1100
Tampa, FL 33619
Phone: (813) 739-1900
Attorney for Tampa Health Care Center

Carl W Cosio

Carl W. Cosio, pro se
3910 North Dartmouth Avenue
Tampa, FL 33603
(813) 223-1297

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I hereby certify that on this day, before me, a Notary Public, duly authorized in the state and county named above to take acknowledgments, personally appeared Carl W. Cosio who is personally known to and who signed this in my presence.

Witness my hand and seal in the county and state named above this 10th day of December, 2005.

stepmead

Notary Public, Commission No.

(Notary name: typed, printed or stamped)

Stephanie Meacham
Commission #DD225413
Expires: Aug 09, 2007
Bonded Thru
Atlantic Bonding Co., Inc.

DATE FILED	INSTRUMENT	PAGE
	CASE NO.: 99-6838 (Cont.)	
Oct. 4, 2001	Motion to Dismiss Amended Complaint	115-117
Feb. 21, 2002	Request for Admissions	118-120
Mar. 20, 2002	Plaintiff's Motion For An Extension of Time Within Which To File A Response To Request For Admissions	121-122
May 3, 2002	Order Granting Consolidation Of Civil Actions	123-124
Jul. 1, 2002	Motion To Withdraw As Counsel	125-126
Jul. 18, 2002	Amended Motion To Amend The Second Complaint, With Attachment Exhibit A Third Amended Complaint (Page 129-150)	127-150
Aug. 26, 2002	Joint Stipulation For Substitution Of Counsel	151
Aug. 26, 2002	Order On Stipulation For Substitution Of Counsel	152-153
Jul. 1, 2003	Order Scheduling Case Management/Dismissal Docket	154-162
Jul. 18, 2003	Defendant's Motion For Dismissal For Failure to Prosecute Under Florida	

	Rule of Civil Procedure 1.420(e)	163-164
Aug. 13, 2003	Motion For Involuntary Dismissal For Failure To Prosecute	165-166

ADDITION

DATE FILED	INSTRUMENT	PAGE
Apr. 8, 2002	Notice Of Hearing dated April 25, 2002	862-863
Jul. 15, 2002	Notice Of Hearing dated July 9, 2002	864-865
Aug. 26, 2002	Letter dated August 19, 2002 from Kirsten K. Ullman to Judge Maye	866
Feb. 5, 2003	Notice Of Unavailability filed by Attorney Kirsten K. Ullman on February 5, 2003	867-868
Aug. 25, 2003	Notice Of Hearing dated August 20, 2003	869
Sep. 26, 2003	Notice Of Hearing dated September 23, 2003	870
Oct. 7, 2003	Notice Of Unavailability filed by Attorney Ronald J. Kurpiers on October 6, 2003	871-872
Mar. 17, 2004	Clerk's Certificate (Re: Response dated August 19, 2001)	873

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

CARL W. COSIO,

Plaintiff,

Vs. Case No. 99-CA-006838

BARBARA BOYD KEITHLY,
LEROY H. MERKLE, JR.,
TIMOTHY P. MORAN, and
BEVERLY CALIFORNIA
CORPORATION (d/b/a TAMPA
HEALTH CARE CENTER),

Defendants.
_____)

NOTICE OF HEARING

You are hereby notified that the undersigned will call up for hearing before the Honorable Vivian Maye, Judge of the above styled case, Hillsborough County Courthouse, 419 Pierce Street, Third Floor, Tampa, FL 33602 on September 30, 2002 at 2:45 p.m. and call up the following:

Attorney Terrence Laster's Motion to Withdraw as Counsel.

(Attorney Laster will appear by telephone)

s/ Terrence Laster
Terrence L. Laster
TERRENCE LASTER, P.A.
67 Stoneridge Road
Durham, NC 27705
(813) 361-5297
FLBN. 172618

App. Doc. # 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing have been furnished this 9th day of July, 2002, to Bradley M. Bole, 535 Central Avenue, St. Petersburg, Florida 33701, W. Bart Meacham, 412 E. Madison Street, Suite 1111, Tampa, Florida 33602, Leroy H. Merkle, Jr., P. O. Box 1774, Tampa, Florida 33601, Timothly P. Moran, P.O. Box 3306, Tampa, Florida 33601, and Michael Howard, P. O. Box 2722, Tampa, Florida 33601, and Carl Cosio, 3910 North Darthmouth Avenue, Tampa, FL 33603.

s/ Terrence L. Laster
Terrence L. Laster

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

CARL W. COSIO,

Plaintiff,

v. Case No. 99CA-007538

TAMPA HEALTH CARE CENTER,

Defendant.
_____/

NOTICE OF UNAVAILABILITY

Kirsten K. Ullman, counsel of record in the above-captioned matter, hereby gives notice as follows:

Undersigned counsel shall be unavailable from April 18, 2003 to April 30, 2003, respectively, due to being on vacation. Therefore, she respectfully request that no hearing, discovery actions, pleadings requiring immediate response, or any other matters whatsoever be scheduled during that time period.

ULLMAN & KURPIERS, LLC

s/ Kirsten K. Ullman
Kirsten K. Ullman
Florida Bar No. 0857210
410 S. Ware Boulevard, Ste 1100
Tampa, Florida 33619
813/739-1900
813/739-1919 (fax)

App. Doc. # 3

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via facsimile and regular U.S. mail to W. Barton Meacham, Esq., 412 E. Madison Street, Suite 1111, Tampa, FL 33602, on this ____ day of February, 2003.

ULLMAN & KURPIERS, LLC

s/ Kirsten K. Ullman
Kirsten K. Ullman
Florida Bar No. 0857210
410 S. Ware Boulevard, Ste 1100
Tampa, Florida 33619
813/739-1900
813/739-1919 (fax)
Attorney for Defendants

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
GENERAL CIVIL DIVISION "B"

STYLE	NO:	TIME
Alice Santos Ramos vs. Beverly Smith and City of Tampa	98-7721	3:00 P.M.
H. & H. Mechanical vs. Camden Operating. L.P., Focus Group,etc.	99-4860	3:00 P.M.
St Paul Fire & Insurance vs. The Shelby Ins. Co.	99-6185	3:00 P.M.
Josephine and Carl Cosio vs. Tampa Health Care Center, etc.	99-6838	3:00 P.M.
Michael Austin vs. James Lee Roberts, Randall Roberts, etc.	99-9442	3:00 P.M.
Tampa Interstate 75 LTD vs. Rob Turner, Property Appraiser	99-10137	3:00 P.M.
Joselito Hidalgo vs. Kimberly B. Rodriquez	00-586	3:00 P.M.
Chase Manhattan Mortgage vs. Carla Sue Kennedy	00-1656	3:00 P.M.
Cheval Tennis Village Cond. Association vs. Suntrust Bank,etc.	00-3828	3:00 P.M.
Dermot Baileyand Thelma Bailey vs. Nationwide Mut.Ins.Co	00-4129	3:00 P.M.
Copelco Capital vs. Interprint of Tampa and Linda Holley vs. Interprint of Tampa vs. Ikon Office Solutions Technology	00-4572	3:00 P.M.
Countrywide Home Loans vs. Silvia A. Rivera, etc.	01-121	3:00 P.M.
Linda Hankerson and Jimmie Lee Hankerson vs. Walgreen Co.	01-172	3:00 P.M.
Janet Surrency and Frank Surrency vs. Florida St.Fair Authority	01-1177	3:00 P.M.
Williams Pointe Limite vs. America income Properties	01-1424	3:00 P.M.
Southwest Bank vs. Benjamin H. Mills etc.	01-3450	3:00 P.M.
Unniversity of South Florida vs. Compco Inc.	01-3759	3:00 P.M.
Southern Commerce Bank vs. William Chastain, etc.	01-3789	3:00 P.M.

App. Doc. # 4

Luis Hernandez vs. Ashton Dean Allen and David A. Moore	**01-5125**	**3:00 P.M.**
State Farm. Ins. Co. vs. Wilner Rosemond and Louis Leone	**01-5127**	**3:00 P.M.**
Bank One vs. Jeffrey Daniels, etc.	**01-2001**	**3:00 P.M.**

JUDGE VIVIAN C. MAYE

ORDER SCHEDULING CASE MANAGEMENT/DISMISSAL DOCKET

(PARTIES MAY AVOID THIS HEARING BY SETTING CASE FOR TRIAL, FILING BANKRUPTCY DOCUMENTATION, VOLUNTARY DISMISSAL, OR PROVIDING DOCUMENTATION THAT THE CASE HAS SETTLED.) BE SURE AND NOTIFY THE JUDICIAL ASSISTANT BEFORE THE CASE MANAGEMENT/DISMISSAL DOCKET IF YOU ARE DOING ANY OF THE ABOVE SO THAT YOU CAN BE RELEASED FROM THE CASE MANAGEMENT/DISMISSAL DOCKET.

WEBSITE FOR FORMS: www,fljud13.org.(TRIAL ORDERS)

RULE 2.085 of the Florida Rules of Judicial Administration provides that certain time standards are presumptively reasonable for the completion of cases. In Civil cases, the following time standards are applicable:

Jury Case-18 months (filing to disposition)

Non-Jury cases-12 months (filing to disposition)

The Court records reveal that the above-styled cause has exceeded or will shortly be exceeding said time standards.

Pursuant to Rule 1.200, Florida Rules of Civil Procedure, and Rule 2.085 (b) and (d), Florida Rules of Judicial Administration, you are required to appear for a **Case Management Conference** on the matters set forth below before the Honorable Vivian C. Maye in Room 364 of the County Courthouse at 419 Pierce St., Tampa, Florida.

************HEARING DATE WEDNESDAY AUGUST 13, 2003 @3:00 P.M.************

Matters specifically to be considered are no case activity in 3-6 months or more.

Case Management Conferences may not be attended by Phone unless the party is incarcerated and has no attorney. Those parties may appear telephonically by calling our hearing line number (813-272-5105) at the appointed date and time. No other calls will be accepted.

PENALTIES UPON FAILURE TO ATTEND: Rule 1.200(c) notice, provides that "On failure of party to attend a conference, **the Court may dismiss the action, strike the pleadings, limit proof or witnesses, or take any other appropriate action" (Emphasis added).**

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida this 24th day of June, 2003.

/s Vivian C. Maye
Vivian C. Maye, Circuit Judge

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

CARL COSIO,

Plaintiff,

v.

Case No. 99CA-007538
Division: E

TAMPA HEALTH CARE CENTER,

Defendant.
_____/

DEFENDANTS' MOTION FOR DISMISSAL FOR FAILURE TO PROSECUTE UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.420(e)

NOW COMES Defendant, TAMPA HEALTH CARE CENTER, by and through its undersigned counsel, and files this Motion for Dismissal for Failure to Prosecute Under Florida Rule of Civil Procedure 1.420(e) and as grounds therefore states as follows:

1. On September 22, 1999, Plaintiff commenced this civil action by filing a Complaint and obtaining a Summons to be issued upon Defendant, TAMPA HEALTH CARE CENTER.

2. On July 16, 2002, Plaintiff filed a Motion to Amend the Second Amended Complaint. Since this date, Plaintiff has taken no action on this matter whatsoever.

3. On August 23, 2002, a Notice of Stipulation of Counsel for Defendant, TAMPA HEALTH CARE CENTER was filed.

4. On February 4, 2003, attorney, Ronald J. Kurpiers,

II attorney for Defendant. TAMPA HEALTH CARE CENTER filed a Notice of Unavailability.

5. On June 24, 2003, a Court Order Scheduling Case Management/Dismissal Docket was entered and set for August 13, 2003 at 3:00 p.m. in front of the Honorable Vivian C. Maye.

6. Other than the last aforesaid filing of Plaintiff on July 16, 2002, Plaintiff has done nothing to move this matter along and has failed to make any efforts to prosecute this matte further. A verification of the Court docket confirms that there has been no activity by filing a pleading, Order of Court, or otherwise subsequent to July 16, 2002 in this case.

WHEREFORE, Defendant is entitled to an Order dismissing this action based on the mandates of Florida Rule of Civil Procedure 1.420(e).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via facsimile to W. Barton Meacham, Esq., 412 E. Madison Street, Suite 1111, Tampa, FL 33602, on this 16th day of July, 2003.

s/ Ronald J. Kurpiers
Ronald J. Kurpiers, II, Esq.
Florida Bar No. 0567140
ULLMAN & KURPIERS, LLC
410 S. Ware Boulevard, Ste 1100
Tampa, Florida 33619
813/739-1900
Attorney for Defendant

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY FLORIDA
CIRCUIT CIVIL DIVISION

CARL W. COSIO,

Plaintiff(s),

vs.

Case No.: 99CA-007538

Division E

BARBARA BOYD KEITHLY, LEROY H. MERKLE, JR., TIMOTHY P. MORAN, AND TAMPA HEALTH CARE CENTER,

Defendant(s).
_____/

PLAINTIFF'S NOTICE OF FILING
AN AFFIDAVIT OF ATTORNEY W. BART MEACHAM

The Plaintiff, Carl W. Cosio, by and through his undersigned counsel, W. Bart Meacham, hereby files and provides notice of filing the attached Affidavit of Attorney W. Bart Meacham.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this

App. Doc. # 6

Notice and the attached Affidavit has been sent by U.S. mail on September 8th, 2003 to Leroy H. Merkle, Jr., P.A., P.O. Box 1774, Tampa, FL 33601-1774, to Timothy P. Moran, P.O. Box 3306, Tampa, FL 33601-3306, to Bradley M. Bole, The Alexander Building, 535 Central Avenue, St. Petersburg, Florida 33701-3703, and to Ullman & Kurpiers, LLC, Attn: Ronald J. Kurpiers, 410 South Ware Blvd., Suite 1100, Tampa, FL 33619.

/s W. Bart Meacham

W. Bart Meacham, Esquire
Florida Bar No. 0043000
412 E. Madison St., Suite 1111
Tampa, FL 33602
(813) 223-6334

AFFIDAVIT OF ATTORNEY W. BART MEACHAM

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

BEFORE ME personally appeared W. Bart Meacham who is over the age of eighteen (18) and otherwise lawfully able to sign this Affidavit, and after being sworn, states:

1. While the Plaintiff through the undersigned counsel asserts that there has been activity on this action within the past year which would justify and support this Honorable Court's refusal to dismiss this action, the Plaintiff through the undersigned counsel offers the following good cause explanation of the factual circumstances surrounding the proposed Third Amended Complaint and the failure to yet obtain a Court Order allowing the filing of the Third Amended Complaint.

2. What is now this action and lawsuit began as two separate actions and lawsuits prior to the Order Granting Consolidation of Civil Actions signed by this Court on May 1, 2002, which consolidated this action with case # 99-006838.

3. Prior to the signing and entering of the foregoing consolidation Order (which was the result of a motion to consolidate filed by Defendant Timothy Moran), the Plaintiff

through the undersigned counsel was in the process of obtaining the signatures of all attorneys in this action on a Joint Stipulation Allowing the Plaintiff to Amend his Second Amended Complaint (hereinafter Joint Stipulation.). The undersigned counsel had already obtained the signatures of Bradley Bole (who signed it on March 7, 2002). Dorothy Venerable (who signed it for Michael Howard on March 13, 2002). and Timothy Moran (who signed it on an unknown date but prior to April 11, 2002). and only needed the signature of Leroy Merkle in order to file the Joint Stipulation and forward an Order approving of the Joint Stipulation to this Court. On or about April 11, 2002, the undersigned counsel sent the Joint Stipulation and a letter to Leroy Merkle requesting that he sign it.

4. Because of, and as a result of, the consolidation Order signed on May 1, 2002, the Plaintiff was forced to amend the proposed Third Amended Complaint and add to the proposed Third Amended Complaint the breach of contract action that was set forth in the Complaint filed and pending in case # 99-006838. As a result, the Plaintiff through the undersigned counsel was required to circulate another Joint Stipulation and

obtain the signatures of all attorneys in this action, even the three (3) attorneys that had already signed the prior Joint Stipulation.

5. On or about July 16, 2002, the Plaintiff through the undersigned counsel filed an Amended Motion to Amend the Second Amended Complaint that included as an Exhibit the revised proposed Third Amended Complaint with the breach of contract action from case # 99-006838.

6. On or about September 30, 2002, attorneys Leroy Merkle and Timothy Moran signed the Joint Stipulation at the courthouse either before or after a hearing that was held in this cause on that day (see the Joint Stipulation and signatures attached as composite Exhibit .A.).

7. On or about October 9, 2002, the Plaintiff through the undersigned counsel mailed the Joint Stipulation to attorneys Michael Howard and Bradley Bole.

8. On or about October 10, 2002, Bradley Bole signed the Joint Stipulation and forwarded it to the undersigned counsel (see Exhibit .A.). As a result, the Plaintiff needed only the signature of Michael Howard, who had previously advised that he

would sign the Joint Stipulation.

9. On or about November 6, 2002, the undersigned counsel (having learned that Michael Howard no longer represented Tampa Health Care Center in this action) mailed the Joint Stipulation and a letter to Attorney Kirsten Ullman (who now represented Tampa Health Care Center in this action) requesting that she sign the Joint Stipulation. In the letter, the undersigned counsel advised Ms. Ullman that attorney Michael Howard had agreed to sign and execute the Joint Stipulation.

10. On or about November 14, 2003, the undersigned counsel contacted the law offices of Ullman & Kurpiers, LLC regarding the status of the signing of the Joint Stipulation and was advised by attorney Ronald Kurpiers that he would primarily be handling this matter instead of attorney Kirsten Ullman and that he was unwilling to sign the Joint Stipulation until I had discussed a possible settlement with the Plaintiff.

11. On or about November 19, 2002, the undersigned counsel sent to Mr. Kurpiers the Joint Stipulation and a letter requesting that he sign it or advise that he is unwilling to sign it so that a hearing can be scheduled. In the letter, the

undersigned counsel wrote that it is not .wise for us to delay this matter any longer based on the possibility that a settlement might somehow be reached. (see the letter attached as Exhibit .B.).

12. On or about January 13, 2003, the undersigned counsel signed the Joint Stipulation and mailed and faxed it to attorney Ronald Kurpiers along with a letter requesting that he sign it.

13. On or about either January 13, 2003 or January 14, 2003, the undersigned counsel contacted this Court's office and obtained available dates and times for a UMC hearing on the Plaintiff's Amended Motion to Amend the Second Amended Complaint.

14. On or about January 14, 2003, the undersigned counsel, with the available UMC dates and times in hand, contacted the law offices of Ullman & Kurpiers, LLC in order to schedule a hearing on the Plaintiff's Amended Motion to Amend the Second Amended Complaint. After having discussed the available UMC hearing dates and times with an assistant of the law offices of Ullman & Kurpiers, LLC, the call was transferred to

attorney Ronald Kurpiers, who advised that he was unwilling to coordinate a hearing date and time with the undersigned counsel and that he represents .Beverly Health and Rehabilitation Services, Inc. d/b/a Tampa Health Care Center. rather than .Beverly California Corporation., who was the Defendant named in the proposed Third Amended Complaint and in prior pleadings filed in this action. The next day and on January 15, 2003, Mr. Kurpiers mailed a letter to the undersigned counsel confirming his unwillingness to sign the Joint Stipulation until the identity of the Defendant was changed. It should be noted that prior counsel Michael Howard had filed pleadings in response to, and not objected to, the identity of the Defendant as .Beverly California Corporation. rather than .Beverly Health and Rehabilitation Services, Inc..

15. Because prior counsel had not objected to the Plaintiff's identifying the Defendant as .Beverly California Corporation. and because during this lawsuit and on July 30, 2001 an entity named Tampa Health Care Associates, LLC filed an application for registration of the fictitious name Tampa Health Care Center (which was registered on August 6, 2001), the

Plaintiff through the undersigned counsel was now uncertain of the correct identity of the entity that needed to be a Defendant in this action and was unwilling to change the identity of the previously named Defendant until discovery on this issue was conducted.

16. During February 2003 (the pleading is not dated), attorney Kirsten Ullman filed a Notice of Unavailability asserting that she was not available from April 18, 2003 to April 30, 2003 and wherein she requested that no hearing, discovery action, or other matters whatsoever be scheduled during this period.

17. On or about June 24, 2003, an Order Scheduling Case Management/Dismissal Docket was entered in this cause.

18. To move this action along and ascertain the identity of the entity that needs to be named as a Defendant in this action, the Plaintiff has recently filed and served on Tampa Health Care Center interrogatories related to this issue and is currently awaiting answers to those interrogatories.

FURTHER AFFIANT SAYETH NOT

/s W. Bart Meacham
W. Bart Meacham

I hereby certify that on this day, before me, a Notary Public, duly authorized in the state and county named above to take acknowledgments, personally appeared W. Bart Meacham who is personally known to me or produced a drivers license as identification and who signed this in my presence.

Witness my hand and seal in the county and state named above this 8th day of September, 2003.

/s Stephanie Meacham
Notary Public, Commission No.

(Notary name: typed, printed or stamped)

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY FLORIDA
CIRCUIT CIVIL DIVISION

CARL W. COSIO,
Plaintiff(s),

Case No.: 99CA-06838

vs.

Division:"B"

TIMOTHY P. MORAN,
Defendant(s).
_____/

JOINT STIPULATION ALLOWING
THE PLAINTIFF TO AMEND HIS SECOND AMENDED COMPLAINT

The Plaintiff, Carl W. Cosio, by and through his undersigned counsel, and the Defendants, Timothy P. Moran, individually, Leroy H. Merkle, Jr., individually, Barbara Boyd Keithly, by and through her undersigned counsel, and Beverly California Corporation (d/b/a Tampa Health Care Center), by and through its undersigned counsel, hereby jointly stipulate and agree to allowing the Plaintiff to Amend the Second Amended Complaint that was filed by the Plaintiff on or about October 11, 2000. The Third Amended Complaint, which is attached as Exhibit .A. to the Amended Motion to Amend the Second Amended Complaint that was filed by the Plaintiff on or about July 16, 2002 shall be deemed filed as of the date of the Order Approving

Joint Stipulation Allowing the Plaintiff to Amend His Second Amended Complaint. The Defendants shall each have twenty (20) days after the date of the Order Approving Joint Stipulation Allowing the Plaintiff to Amend His Second Amended Complaint to file an Answer or other responsive pleading to the Third Amended Complaint. This Joint Stipulation Allowing the Plaintiff to Amend His Second Amended Complaint may be executed in counterparts.

/s Tim Moran
Tim Moran
P.O. Box 3306
Tampa, FL 33601-3306
(813) 253-3277
Dated: September 30, 2002

/s W. Bart Meacham
W. Bart Meacham
412 E. Madison St., Ste 1111
Tampa, FL 33602
(813) 223-6334
Dated: January 13, 2003

/s Leroy H. Merkle Leroy
H. Merkle, Jr.
P.O. Box 1774
1718 East 7th Avenue, Ste 202
Tampa, FL 33601-1774
(813) 314-0555
Dated: September 30, 2002

Michael S. Howard
P.O. Box 2722
Tampa, FL 33601-2722
(813) 277-0003
Dated:

/s Bradley M. Bole
Badley M. Bole
535 Central Avenue
St. Petersburg, FL 33701
(727) 823-4191
Dated: October 10, 2002

W. Bart Meacham, Esquire
412 E. Madison St., Suite 1111
Tampa, FL 33602
(813) 223-6334; (813) 221-2182 (facsimile)

November 19, 2002

Ullman & Kurpiers, LLC
Attn: Ronald J. Kurpiers
410 South Ware Blvd., Suite 1100
Tampa, FL 33619

RE: Carl W. Cosio v. Barbara Boyd Keithly, Leroy H. Merkle, Jr., Timothy P. Moran, and Tampa Health Care Center
Case No. 99-06838, Division .B.

Dear Mr. Kurpiers:

In response to your letter dated November 15, 2005, enclosed is another copy of my client's Amended Motion to Amend the Second Amended Complaint and the attached Third Amended Complaint that I served on Michael Howard on or about July 16, 2002 and that is referenced in the Joint Stipulation that I mailed to your partner on or about November 6, 2002.

Please let me know at your earliest convenience if are agreeable to signing the Joint Stiulation or if a hearing is necessary on the motion. Regarding my failure to yet discuss a possible settlement with your client and what my client is seeking from your client, I must take all the blame for not yet getting back to you. I have almost completely lost my voice and have not

been able to have a detailed and lengthy conversation with Mr. Cosio. I am hoping that my voice will be better by the end of this week and that Mr. Cosio and I can sit down and talk early next week.

I must say that I do not think that it is wise for us to delay this matter any longer based on the possibility that a settlement might somehow be reached between your client and Mr. Cosio, and I am hoping that you agree. Accordingly, I would greatly appreciate your letting me know the status of your possible execution of the Joint Stipulation upon your receipt of this letter and enclosure and without regard to when I will be able to speak with Mr. Cosio. Either way, I will be looking forward to hearing from you.

Sincerely,

/s W. Bart Meacham

W. Bart Meacham

Enclosure

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY FLORIDA
CIRCUIT CIVIL DIVISION

CARL W. COSIO,

Plaintiff(s),

vs.

Case No.: 99CA-007538

Division E

BARBARA BOYD KEITHLY, LEROY H. MERKLE, JR., TIMOTHY P. MORAN, AND TAMPA HEALTH CARE CENTER,

Defendant(s).
_____/

PLAINTIFF'S NOTICE OF FILING
AN AFFIDAVIT OF PLAINTIFF CARL W. COSIO

The Plaintiff, Carl W. Cosio, by and through his undersigned counsel, W. Bart Meacham, hereby files and provides notice of filing the attached Affidavit of Plaintiff Carl W. Cosio.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this

App. Doc. # 7

Notice and the attached Affidavit has been sent by U.S. mail on October 2, 2003 to Leroy H. Merkle, Jr., P.A., P.O. Box 1774, Tampa, FL 33601-1774, to Timothy P. Moran, P.O. Box 3306, Tampa, FL 33601-3306, to Bradley M. Bole, The Alexander Building, 535 Central Avenue, St. Petersburg, Florida 33701-3703, and to Ullman & Kurpiers, LLC, Attn: Ronald J. Kurpiers, 410 South Ware Blvd., Suite 1100, Tampa, FL 33619.

/s W. Bart Meacham

W. Bart Meacham, Esquire
Florida Bar No. 0043000
412 E. Madison St., Suite 1111
Tampa, FL 33602
(813) 223-6334

AFFIDAVIT OF PLAINTIFF CARL W. COSIO

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

BEFORE ME personally appeared Carl W. Cosio who is over the age of eighteen (18) and otherwise lawfully able to sign this Affidavit, and after being sworn, states:

1. In early 2000, I retained attorney George P. Kickliter, attorney Terrance L. Laster, and attorney W. Bart Meacham to represent me in this action. Per the agreement of representation, George P. Kickliter was lead counsel and responsible for 50% of the legal work, and Mr. Laster and Mr. Meacham were working under Mr. Kickliter and each responsible for 25% of the legal work. Further, because Mr. Kickliter had represented me in the other lawsuits that formed the basis of this lawsuit, he had a substantial amount of knowledge as to the facts of the case and also had most of the documentation related to this case.

2. At a hearing, Judge Bonanno dismissed the First Amended Complaint and ordered that a Second Amended Complaint be filed. It was agreed by me and all three of my attorneys that Mr. Meacham would draft and prepare a Second

Amended Complaint. Because Mr. Kickliter was most knowledgeable as to the facts, Mr. Meacham requested his assistance regarding several factual allegations that needed to be included in the Second Amended Complaint. Rather that assist Mr. Meacham in the filing of the Second Amended Complaint, Mr. Kickliter, on own behalf and without my permission, filed a Second Amended Complaint that he prepared and that is substantially similar to the First Amended Complaint that was dismissed by Judge Bonanno.

3. After Mr. Kickliter's filing of the Second Amended Complaint without my approval, I repeatedly and continuously attempted to contact Mr. Kickliter to get him to cooperate with Mr. Meacham and get Mr. Meacham the facts that were needed to finish a Third Amended Complaint, but Mr. Kickliter refused to cooperate with him and refused to return my phone calls. After it became obvious that Mr. Kickliter would not be returning any of my phone calls, I went to his home (which was also his office) so that I could talk to him. In response, he filed a motion to withdraw from his representation of me in this matter and scheduled a hearing on his motion. At the hearing, Judge

Bonanno granted Mr. Kickliter's motion and allowed Mr. Kickliter to withdraw from this matter.

4. As a result of Mr. Kickliter's withdrawal, I was forced to pay Mr. Laster and Mr. Meacham an additional $5,000.00 each, and their responsibility in this matter increase from 25% to 50%.

5. Soon thereafter, Mr. Laster filed a motion to withdraw claiming that medical problems prevented him from meeting his contractual obligations to me and required him to withdraw from this matter.

6. Because Mr. Laster's motion failed to state what kind of medical problems he was having and because Mr. Meacham and I were both wanting him to continue to represent me in this action (even if from another state), we tried to contact him for the next few moths to obtain details about his medical problems and situation and to ascertain if he could continue to assist in this matter from another state. Unfortunately, neither Mr. Meacham nor I were able to reach him.

7. Because we could not contact Mr. Laster by telephone, Mr. Meacham and I agreed to talk to Mr. Laster prior

to the hearing on his motion to withdraw, which was scheduled for September 30, 2002, to discuss matters with him and ascertain whether he was able and willing to continue to represent me (even if from another state).

8. Unfortunately, because Mr. Laster did not appear for the September 30, 2002 hearing, Mr. Meacham and I were unable to discuss matters with him. As a result, it became obvious that Mr. Meacham would not have any assistance from Mr. Laster in representing me in this action and in moving this action along.

9. Thereafter, Mr. Meacham agreed to continue to represent me in this action, even

10. Because of the money that I had wasted on Mr. Kickliter and Mr. Laster and because of my belief that obtaining additional counsel at this time would only delay matters further, I asked Mr. Meacham to continue to represent me, even though he would now be responsible for 100% of the legal work in this matter. Mr. Meacham, always believing that he would have the assistance of other attorneys in this action, reluctantly agreed to continue to represent me and accept 100% of the

responsibility.

11. Further, both Mr. Kickliter and Mr. Laster are no longer licensed to practice law in the State of Florida as a result of, in part, their conduct and actions in representing me in this action.

FURTHER AFFIANT SAYETH NOT

/s Carl W. Cosio
Carl W. Cosio

I hereby certify that on this day, before me, a Notary Public, duly authorized in the state and county named above to take acknowledgments, personally appeared Carl W. Cosio who is personally known to me or produced a drivers license as identification and who signed this in my presence.

Witness my hand and seal in the county and state named above this 1st day of October, 2003.

/s Stephanie Meacham
Notary Public, Commission No.

(Notary name: typed, printed or stamped)

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY FLORIDA

CARL W. COSIO,

Plaintiff,

vs.

Case No.: 99CA-007538
Division E

BARBARA BOYD KEITHLY, individually, LEROY H. MERKLE, JR., individually, TIM MORAN, individually, AND TAMPA HEALTH CARE CENTER,

Defendants.
_____/

ORDER ON DEFENDANTS' MOTION TO DISMISS FOR LACK OF PROSECUTION

THIS MATTER came for hearing on October 9, 2003, on the motion of Defendants for dismissal of this action for lack of prosecution pursuant to Fla. R. Civ. P. 1.420(e). The court has heard argument of counsel, reviewed affidavits filed by the Plaintiff, and considered case law presented by the parties. The court makes the following findings of fact:

1. There was no record activity in this file within a year prior to the date on which the first Motion to Dismiss for Lack of Prosecution was filed.

App. Doc. # 8

2. The Plaintiff has failed to show good cause as to why this action should not be dismissed pursuant to Fla. R. Civ. P. 1.420(e).

THEREFORE, IT IS ORDERED that this case is dismissed pursuant to Fla. R. Civ. P. 1.420(e).

DONE AND ORDERED, in Chambers, at Tampa, Hillsborough County, Florida, this 16th day of October, 2003.

/s Vivian C. Maye
Circuit Court Judge

cc: BRADLEY M. BOLE, ESQ.
W. BART MEACHAM
RONALD KURPIERS, ESQ.
TIM MORAN
LEROY H. MERKLE, JR.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CARL W. COSIO,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D03-5159
	)	
BARBARA BOYD KEITHLY, LEROY H. MERKLE, JR., TIMOTHY P. MORAN, and AND TAMPA HEALTH CARE CENTER,	)	
	)	
Appellees.	)	
	)	

Opinion filed January 5, 2005.

Appeal from the Circuit Court for Hillsborough County; Vivian C. Maye, Judge.

W. Bart Meacham, Tampa, for Appellant.

Melody M. Dietsch of Ullman, Bursa, Hoffman & Ragano, LLC, Tampa, for Appellee Health Care Center.

Bradley M. Bole of Rahdert, Steele, Bryan, Bole & Reynolds, P.A., St. Petersburg, for Appellee Barbara Boyd Keithly.

App. Doc. # 9

No Appearance for Appellee Leroy H. Merkle, Jr. or Appellee Timothy P. Moran

PER CURIAM.

We affirm the dismissal and certify conflict with Dye v. Security Pacific Financial Services, Inc., 828 So.2d 1089 (Fla. 1st DCA 2002). See Sewell Mansonry Co. v. DCC Constr., Inc., 862 So.2d 893, 899 (Fla. 5th DCA 2003).

Affirmed; conflict certified.

DAVIS and VILLANTI, JJ., and THREADGILL, EDWARD F., SENIOR JUDGE, Concur.

SUPREME COURT OF FLORIDA
Wednesday, July 6, 2005

CASE NO.: SC05-233
Lower Tribunal No.: 2D03-5459

CARL W. COSIO vs. BARBARA BOYD KEITHLY, ET AL.

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on Certified Direct Conflict of Decisions pursuant to Article V, Section 3(b), Florida Constitution (1980), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi), and the Court having determined that it should decline to exercise jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. 9.330(d).

PARIENTE, C.J., and WELLS, QUINCE, CANTERO and BELL, JJ., concur.
ANSTEAD and LEWIS, JJ., dissent.

A True Copy
Test:

App. Doc. # 10

/s Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

lc
Served:

W. BART MEACHAM
MELODY MARIEA DIETSCH
TIMOTHY P. MORAN
BRADLEY M. BOLE
HON. VIVIAN CORVO MAYE, JUDGE
LEROY H. MERKLE, JR.
DANIEL S. GREEN
KIRSTEN KARIN ULLMAN
HON. PAT FRANK, CLERK
HON. JAMES BIRKHOLD, CLERK

Docket No. 05-771

FILED
JAN
OFFICE

IN THE SUPREME COURT OF THE UNITED STATES

CARL W. COSIO, Petitioner

v.

BARBARA BOYD KEITHLY, LEROY H. MERKLE, JR., TIMOTHY P. MORAN, AND TAMPA HEALTH CARE CENTER, Respondents.

On Petition for Writ of Certiorari from the Supreme Court of Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Daniel S. Green, Esq.
Florida Bar No. 339430
ULLMAN, BURSA HOFFMAN
and RAGANO, L.L.C.
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Counsel for Respondent,
Tampa Health Care Center

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES ii

QUESTIONS PRESENTED FOR REVIEW v

LIST OF PARTIES TO THE PROCEEDING IN THE FLORIDA SUPREME COURT v

CORPORATE DISCLOSURE STATEMENT v

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 4

A. The Petitioner Lacks Standing 4

B. The Issue Petitioner Asserts Is Moot 7

C. Dismissal for Lack of Prosecution did not Violate Petitioner's Due Process Under the Fourteenth Amendment 8

CONCLUSION 13

NOTARIZED AFFIDAVIT OR DECLARATION IN COMPLIANCE WITH 28 U.S.C. § 1746(2) AND SUPREME COURT RULE 29(C) 14

TABLE OF CITED AUTHORITIES

U.S. Supreme Court Cases

Boyle v. Landry,
401 U.S. 77, 91 S.Ct. 758,
27 L.Ed. 696 (1971) 7

Chambers v. NASCO, Inc.,
501 U.S. 32, 111 S.Ct. 2123,
115 L.Ed. 27 (1991) 8

DeFunis v. Odegaard,
416 So.2d 312, 94 S.Ct. 1704,
40 L.Ed.2d 164 (1974) 7

Friends of the Earth, Inc. v.
Laidlaw Environmental Services, Inc.,
528 U.S. 167, 120 S.Ct. 693,
145 L.Ed.2d 610 (2000) 3

FW/PBS, Inc. v. Dallas,
493 U.S. 215, 110 S.Ct. 596,
104 L.Ed.2d 603 (1990) 3

Link v. Wabash R. Co.,
370 U.S. 626, 82 S.Ct. 1386,
8 L.Ed. 734 (1962) . . . . . passim

Logan v. Zimmerman Brush Co.,
455 U.S. 422, 102 S.Ct. 1148,
71 L.Ed.2d 265 (1982) 11, 12

Lujan v. Defenders of Wildlife,
507 U.S. 555, 112 S.Ct. 2130,
119 L.Ed.2d 351 (1992) 3

Powell v. McCormack,
395 U.S. 486, 89 S.Ct. 1944,
23 L.Ed.2d 491 (1969) 1

Simon v. Eastern Ky. Welfare Rights Organization,
426 U.S. 26, 96 S.Ct. 1917,
48 L.Ed.2d 450 (1976) 5

United States Parole Comm'n v. Geraghty,
445 U.S. 338, 100 S.Ct. 1202,
63 L.Ed.2d 479 (1980) 7

Warth v. Seldin,
422 U.S. 490, 95 S.Ct. 2197,
45 L.Ed.2d 343 (1975) 4

Whitmore v. Arkansas,
495 U.S. 149, 110 S.Ct. 1717,
109 L.Ed.2d 135 (1990) 3

Circuit Court of Appeals Cases

Adams v. Trustees of New Jersey Brewery,
29 F.3d 863 (3d Cir. 1996) 9

Byrne v. Nezhat,
261 F.3d 1075 (11th Cir. 2001) 9

Gardner v. U.S.,
211 F.3d 1305 (D.C. Cir. 2000) 9

Mulbah v. Detroit Bd. of Education,
261 F.3d 586 (6th Cir. 2001) 9

State Cases

Cosio v. Keithly,
907 So.2d 1170 (Fla. 2005) 1, 11

Cosio v. Keithly,
889 So.2d 1017 (Fla. 2d DCA 2005) 1, 11

Constitutional Provision and Rules

U.S. CONST. Art. III, § 2 . . . . . passim

U.S. CONST. Amendment 14 . . . . . v, 2, 8

Fla. R. Civ. P. 1.420(e) . . . . . passim

Fed. R. Civ. P. 41(b) 9, 12

Sup. Ct. R. 29 v

QUESTIONS PRESENTED FOR REVIEW

Whether Fla. R. Civ. P. 1.420(e), as applied in a case that was dismissed a case for failure to prosecute that Petitioner refiled and is currently litigating, violates the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES TO THE PROCEEDING IN THE FLORIDA SUPREME COURT

The parties to the Florida Supreme Court proceeding were Barbara Boyd Keithly, Leroy H. Merkle, Jr., Timothy P. Moran, and Tampa Health Care Center.

CORPORATE DISCLOSURE STATEMENT

Pursuant to SUP. CT. R. 29.6, Respondent, Tampa Health Care Center discloses its parent company and licensee as Beverly Health and Rehabilitation Services, Inc.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The Florida Supreme Court case for which the Petition was filed is reported at *Cosio v. Keithly*, 907 So.2d 1170 (Fla. 2005). This case was also decided (and dismissal affirmed) by the Second District Court of Appeal for the State of Florida at *Cosio v. Keithly*, 889 So.2d 1017 (Fla. 2d DCA 2005).

BASIS FOR JURISDICTION

Respondent, Tampa Health Care Center, contends that Petitioner lacks standing to Petition this Honorable Court for a Writ of Certiorari for the reasons set forth below. This Respondent also contends that the case Petitioner seeks review of is moot. Accordingly, this Respondent respectfully asserts that this Court is without jurisdiction pursuant to the definition of mootness this Court established in *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969) and Article 3, Section 2 of the United States Constitution.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case involves Article 3, Section 2 of the United States Constitution, The Fourteenth Amendment to the United States Constitution, and Fla. R. Civ. P. 1.420(e), which provides for dismissal of a civil claim for failure to prosecute.

STATEMENT OF THE CASE

This Respondent reserves the right to assert a full Statement of the Case in its Answer Brief should this Honorable Court grant certiorari. This Respondent does state, however, that the action for which Petitioner seeks review from this Honorable Court was dismissed on October 16, 2003 after a hearing held on October 9, 2003. Petitioner filed a complaint alleging the same and similar allegations to the complaint at issue in this matter on November 5, 2003 that was removed to federal court and subsequently dismissed. Petitioner also filed a complaint as Personal Representative of his mother's estate on September 2, 2003 alleging similar allegations as contained in the November 5, 2003 Complaint.

ARGUMENT

For the reasons set forth below, Respondent, Tampa Health Care Center respectfully requests this Honorable Court to deny Petitioner's Petition for Writ of Certiorari.

A. The Petitioner Lacks Standing

This Court has repeatedly held that Article 3, Section 2 of the United States Constitution requires a Petitioner to have standing in order to have their case or controversy heard before the Court. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 704, 145 L.Ed.2d 610 (2000); *Lujan v. Defenders of Wildlife*, 507 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). This limits involvement of the Court to "disputes which are appropriately resolved through the judicial process." *Lujan*, 507 U.S. at 560, 112 S.Ct. at 2136 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990)). A party invoking federal jurisdiction (the Petitioner in this case) must establish the elements of standing. *See Lujan*, 507 U.S. at 561, 112 S.Ct. at 2136; *FW/PBS, Inc. v. Dallas*, 493

U.S. 215, 231, 110 S.Ct. 596, 608, 104 L.Ed.2d 603 (1990). Petitioner has failed to meet this burden.

The first standing requirement mandates that the Petitioner/Plaintiff suffer and "injury in fact." *Lujan*, 507 U.S. at 561, 112 S.Ct. at 2136. Such an injury must be "concrete and particularized." *Id.*; *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975). "Concrete and particularized" is defined as an injury that personally and individually affects the plaintiff. *Lujan*, 507 U.S. 555, 112 S.Ct. 2130 at fn.1. The injury must also be "actual or imminent, not 'conjectural' or 'hypothetical.' *Id.* at 561, 112 S.Ct. at 2136.

In this case, the only injury that Petitioner can assert is dismissal of one of the many claims that he filed. Petitioner fails to inform this Honorable Court that he filed claim that was removed to federal court that alleged the same and similar allegations as the claim for which he seeks review. Only recently was this federal claim dismissed on different grounds. Mr. Cosio unsuccessfully attempted to appeal that dismissal to the Eleventh Circuit Court of Appeal. He also filed another state claim on behalf of his mother against this Respondent. The

documentation is too voluminous to include in this Brief in Opposition, but will be produced should this Court grant Certiorari. In any event, Mr. Cosio did not suffer an inability to refile his complaint or seek redress for his claim as a result of this dismissal. Quite the opposite, Petitioner, upon dismissal, immediately filed another complaint with the same and similar allegations while appealing the original dismissal, and litigated that new complaint to its conclusion, albeit unsuccessfully. It is therefore unclear how Petitioner had any injury in fact that stemmed from the dismissal for which he seeks review.

The second element for a Petitioner/Plaintiff to satisfy is that there must be "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the [C]ourt." *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 at 41-42, 96 S.Ct. 1917 at 1926, 48 L.Ed.2d 450 (1976)).

In this case, the second element cannot be satisfied since Petitioner himself bears the closest causal relation to his own

dismissal. Should this Court grant Certiorari, the documentation will show that Petitioner failed to timely submit documentation showing that he had good cause to avoid dismissal. This Respondent will point out several means by which Petitioner could have easily avoided dismissal during the one-year period of record inactivity that led to Petitioner's dismissal, including setting motions to dismiss for hearing and propounding discovery. Petitioner failed to do so.

The final element of standing is that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561, 112 S.Ct. at 2136. In this case, all that a favorable decision will accomplish is to provide Petitioner with a third or even fourth "bite of the apple," as evidenced by the numerous claims and appeals that he filed following the hearing that resulted in this claim's dismissal as described above. A favorable decision will do nothing but breath new life into claims that have already been litigated and dismissed in a separate action in federal court that is not before this Honorable Court.